IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.2.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

CRIMINAL APPEAL No.284 of 2000

Rajammal ..Appellant /Complainant

-vs-

Gopalakrishnan .. Respondent /Accused

This appeal is filed under Section 378(1) Crl.P.C. against the Judgment made in C.A.No.90 of 1995 dated 9..12.1996 on the file of the Court of Principal Sessions Judge, Chengleput[CC No. 277/89 dated 19.8.95 on the file of the Court of the Judicial Magistrate, Ambattur].

For appellant : Mr.J.R.K.Bhavanandam

For respondent : Mr.S.Ashok Kumar, Senior Counsel for Mr.C.D.Johnson

JUDGMENT

This appeal has been preferred against the Judgment in C.A.No.90 of 1995 on the file of Court of Principal Sessions Judge, Chenglepet.

2. The complainant who has preferred C.C.No.277 of 1989 under Sections 494 and 496 IPC is the appellant herein. The complainant is the first wife of the accused. The learned trial Judge after taking the complaint on file, issued summons to the accused. On appearance of the accused, copies under Section 207 Cr.P.C. were furnished to the accused. The charges punishable under Sections 494 and 496 IPC were framed against the accused and when questioned the accused, pleaded not guilty.

3. On the side of the complainant P.Ws 1 to 3 were examined and Exs P1 to P3 were marked. P.W.1 is the complainant who would depose that a marriage between her and the accused took place on 29.4.1964 and that they have been blessed with two female children and one male child in the wed-lock. During 1980, the accused had driven her(P.W.1)out from the matrimonial home and hence she went to her mother's house and that the accused had eloped with her sister Rajalakshmi who was studying in the college at that time. The accused had taken his sister in law Rajalakshmi to Varkala and married her and the marriage was a registered one. The said factum of second marriage was informed by the

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accused through telephone on 30.3.1981 to the brother of P.W1. The evidence of P.W.1 was corroborated by the evidence of P.W.3, the mother of P.W.1. P.W.2 is an Upper Division Clerk at Sub Registrar's Office , Varkala. He has produced book No.41 Volume 70 of 1981 maintained in the Sub Registrar's Office, Varkala which will go to show that an agreement of marriage has been entered into on 30.3.1981 between the accused Gopalakrishnan and Rajalakshmi, the sister of the complainant to the effect that both of them are living together as husband and wife. The said agreement has been registered in the said Sub Registrar's Office, Varkala.

4. The trial Court has come to a conclusion that the second marriage between Rajalakshmi and the accused has not been proved and consequently, dismissed the complaint for an offence punishable under Section 494 IPC and has taken the complaint on file for an offence punishable under Section 496 IPC. When incriminating circumstances were put to the accused, the accused pleaded innocence.

5. After going through the available evidence, the learned trial Judge has convicted the accused under Section 496 IPC. Aggrieved by the findings of the learned trial Judge, the accused has preferred an appeal in C.A.No.90 of 1995 before the learned Principal Sessions Judge, Chengleput, who after careful consideration of the material records has come to a conclusion that the complainant, viz., the first wife of the accused is not competent in law to prefer the complaint for an offence punishable under Section 496 IPC against the accused who is her husband, holding that the complainant is not aggrieved person to prefer a complaint against the accused under Section 496 IPC and ultimately held that the Judgment of the trial Court in C.C.No.277 of 1989 is not sustainable and accordingly allowed the appeal and setting aside the Judgment in C.C.No.277 of 1989 on the file of Court of Judicial Magistrate, Ambattur. Aggrieved by the said findings of the first appellate Court, the complainant has preferred this appeal. There is no appeal preferred against the findings of the learned trial Judge in respect of the dismissal of the complaint against the offence under Section 494 IPC.

6. Now the point for consideration in this appeal is whether the judgment in C.A.No.90 of 1995 on the file of the Court of Principal Sessions Judge, Chengleput is liable to be set aside for the reasons stated in the memorandum of appeal?.

7. The Point:

The only point to be decided in this appeal is whether the complainant is competent to prefer a complaint under Section 496 IPC. Section 496 IPC runs as follows:

> "Marriage ceremony fraudulently gone through without lawful marriage: Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of

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being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

8. The learned counsel appearing for the appellant would contend that because of the second marriage of the accused with Rajalakshmi, the most affected party is the first wife, the complainant herein and that he would contend that the complaint preferred by the first wife is valid.

9. The learned Senior Counsel appearing for the respondent would contend that as per Section 198 Cr.P.C., only the person aggrieved by the offence comprised under Chapter XX of the Indian Penal Code alone is competent to prefer and maintain a complaint for an offence under Section 496 IPC.

Section 198 Cr.P.C. runs as follows:

"Prosecution for offences against marriage: (1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that -

a) Where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

b) Where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (4) may make a complaint on his behalf;

c) Where the person aggrieved by an offence punishable under Section 494 or Section 495 of the Indian Penal Code(45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister, with the leave of the Court, by any other person related to her by blood, marriage or adoption.

(2) For the purpose of sub-section(1) no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under

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Section 497 or Section 498 of the said Code:
Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.
3) When in any case falling under Clause (a) of the proviso to sub-section (1) the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard.
4) The authorisation referred to in clause(b) of the proviso to sub-section (1) shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.
5) Any document purporting to be such an authorisation and complying with the provisions of sub-section (4) and any document purporting to be a certificate required by that sub-section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.
6) No Court shall take cognizance of an offence under Section 376 of the Indian Penal Code(45 of 1860), where such offence consists of sexual inter course by a man with his own wife, the wife being under fifteen years of age, if more than one year has elapsed from the date of the commission of the offence.
7) The provisions of this Section apply to the abetment of, or attempt to commit, an offence as they apply to the offence."

10.As per Section 198(c), the aggrieved person under Sections 494 and 495 is the wife. But as far as Section 496 IPC is concerned, the wife is not an aggrieved person and to substantiate this contention,the learned counsel appearing for the respondent relying on a decision

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reported in Prasanna Kumar-vs- Dhanalaxmi (1989 Crl.L.J.1829) wherein it has been held by the learned Judge of this Court that in an offence under Section 496 IPC a complaint thereof can be maintained only by an aggrieved person viz., the person deceived. The short facts of the above case are as follows:

"A petition under Section 482 Cr.P.C. was filed before this Court to quash a proceeding initiated before Xth Metropolitan Magistrate, Egmore, Madras in C.C.No.13217 of 1987 for an offence under Sections 494,496 and 498-A IPC. Dhanalaxmi who is the first respondent has filed a complaint against the petitioner and five others alleging that she had married the petitioner at Tanjavur on 29.4.1979 and there are two issues a girl aged about nine years and a boy aged about five years and that she lived with the petitioner until the year 1982 and their last residence was at No.54, Vellala St.,Ayyanavaram, Madras and she was finally deserted in March 1983. Further according to her, the petitioner demanded dowry by way of jewels and cash before the marriage and after the marriage and also demanded scooter,television, fridge etc and she was treated cruelly. She filed a petition for restitution of conjugal rights in O.P.No.426 of 1983 and it was withdrawn and later O.P.No.340 of 1985 was filed on the file of the City Civil Court, for divorce and while the case was pending, she had occasioned to go to petitioner's house with her father and his friends as suggested by the Judge of the City Civil Court, Madras to talk about the compromise and on that occasion that petitioner was not in the house but the second respondent herein was present in the house and when enquired she informed that she is the wife of the petitioner and on further enquiries the first respondent herein learnt that the petitioner married the second respondent herein and the marriage was performed in the presence of the other accused and some of the people to the accused. The second respondent delivered a child and the birth of the child had been concealed by giving false address. In the sworn statement she is mentioned about the demanding of the dowry six months after the marriage. Further it has been mentioned in the complaint that the first respondent came to know that the marriage was performed secretly . It has been held by this Court for an offence under Section 494 IPC, a complaint cannot be maintainable since Section 496 IPC applies to cases in which a ceremony is gone through which would in no case constitute a marriage, and in which one of the parties is deceived by the other into the belief that it does constitute a marriage or in which effect is sought to be given by proceeding to some collateral fraudulent purpose. The essence of Section 496 IPC is that there should be a dishonest or fraudulent abuse of marriage ceremony and for this complaint by the person aggrieved is necessary. If it relates to the marriage of the petitioner with the second respondent the complaint by the first respondent is not maintainable.

11. While dealing with a case of acquittal, it is well known that this Court shall not ordinarily over turn the Judgment, unless it is patently visible that the findings of the Court below is perverse or

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against the principles of law.

12.The learned counsel appearing for the appellant would contend that under Special Marriage Act 1954, a special marriage can be solemnised as per Section 4 of the said Act, a marriage between any two persons can be solemnised, if at the time of the marriage the following conditions are fulfilled ,namely:-
a) neither party has a spouse living;
b) neither party-
(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
(ii) though capable of giving a valid consent,has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
(iii) has been subject to recurrent attacks of insanity
(c) the male has completed the age of twenty one years and the female the age of eighteen years;
(d) the parties are not within the degrees of prohibited relationship
Provided that where a custom governing at least one of the parties permits of a marriage between them,such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship and
e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.
Explanation: In this Section,"custom", in relation to a person belonging to any tribe, community, group or family means any rule which the State Government may, by notification in the Official Gazaette, specify in this behalf as applicable to members of that tribe, community, group or family.
Provided that no such notification shall be issued in relation to the members of any tribe, community, group or family, unless the State Government is satisfied-
(i) that such rule has been continuously and uniformly observed for a long time among those members;
(ii) that such rule is certain and not unreasonable or opposed to public policy and
(iii) that such rule, if applicable only to a family, has not been discontinued by the family."

13. The learned counsel appearing for the appellant would contend that Ex P3 will go to show that an offence of Bigamy under Section 494 IPC has been committed. But the trial Court itself has acquitted the accused for an offence under Section 494 IPC on the ground that from Ex P3, it cannot be said that the marriage has been solemnised between the accused and Rajalaxmi. Against the said finding, there was no appeal preferred by the appellant.

14. As far as the findings of the first appellate Court in respect

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of an offence under Section 496 IPC is concerned, the learned first appellate Court has correctly come to a conclusion that the appellant, the first wife herein is not an aggrieved person to prefer a complaint as per the proviso to Section 198 Cr.P.C.

15.Under such circumstances, I do not find any illegality or infirmity or perverse attitude in the Judgment of the learned first appellate Judge in C.A.No.90 of 1995 on the file of Court of the Principal Sessions Judge, Chenglepet to warrant any interference from this Court. Point is answered accordingly.

16. In fine, the appeal is dismissed confirming the Judgment in C.A.No.90 of 1995 on the file of the Court of Principal Sessions Judge, Chenglepet. At this juncture, the learned counsel for the appellant would contend that some provisions may be made in the house purchased by the husband for the residence of the appellant. But as far as this appeal is concerned, there is absolutely no evidence on record to show that there is a house standing in the name of the husband. If there is a house certainly her children will be entitled to a share in that house and they have to move before the Civil Court for appropriate remedy.

sg

Sd/
Asst. Registrar

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Sub Asst.Registrar

To

1. The Principal Sessions Judge
Chenglepet.

2. The Judicial Magistrate,
Ambattur.

3. - do - thro' the Chief Judicial Magistrate,
Tiruvallur.

2 ccs to Mr.J.R.K. Bhavanantham, Advocate (SR 6165 & 5833)

1 cc to mr.c.d. Jonhson, advocate sr 6174

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